

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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**EDGAR ABLAN, ET AL.,**  
*Plaintiffs*

**CHRISTINA BANKER, TODD BANKER**  
*Plaintiffs-Appellees*

v.

**UNITED STATES,**  
*Defendant-Appellant*

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2023-1363

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Appeal from the United States Court of Federal Claims in No. 1:17-cv-01409-CFL, 1:17-cv-09001-CFL, Senior Judge Charles F. Lettow.

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**SANDRA ABDOU, ET AL.,**  
*Plaintiffs*

**ELIZABETH BURNHAM**  
*Plaintiff-Appellee*

v.

**UNITED STATES,**  
*Defendant-Appellant*

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2023-1365

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Appeal from the United States Court of Federal Claims in No. 1:17-cv-01786-CFL, 1:17-cv-09001-CFL, Senior Judge Charles F. Lettow.

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**CHRISTINA MICU, AND ALL OTHERS SIMILARLY SITUATED,  
SCOTT HOLLAND, CATHERINE POPOVICI, KULWANT SIDHU,**  
*Plaintiffs-Cross-Appellants*

**ELISIO SOARES, SANDRA GARZA RODRIGUEZ,  
ERICH SCHROEDER, MARINA AGEYEVA,  
GLENN PETERS, VIRGINIA HOLCOMB,**  
*Plaintiffs*

v.

**UNITED STATES,**  
*Defendant-Appellant*

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2023-1366, 2023-1412

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Appeals from the United States Court of Federal Claims in No. 1:17-cv-01277-  
CFL, 1:17-cv-09001-CFL, Senior Judge Charles F. Lettow.

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**MOTION FOR 30-DAY EXTENSION OF TIME TO FILE  
THE OPENING BRIEF FOR THE UNITED STATES**

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BRIAN C. TOTH  
*Attorney*  
Appellate Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Post Office Box 7415  
Washington, D.C. 20044  
(202) 305-0639  
[brian.toth@usdoj.gov](mailto:brian.toth@usdoj.gov)

The United States seeks a further 30-day extension of time for filing the opening brief on appeal, currently due May 12, 2023. This is the government's second motion for an extension of this deadline, after having obtained a 60-day extension. Under the proposed request, the opening brief would be due June 12, 2023. Counsel for the United States has contacted counsel for Plaintiffs-Appellees, some of whom oppose this motion and plan to file a response. *See infra* (p. 6). The reasons for this request are set forth in the attached declaration.

This appeal is from a Rule 54(b) judgment by the Court of Federal Claims ("CFC") that the owners of six bellwether properties located near Houston, Texas, are entitled to compensation for a Fifth Amendment taking of a flowage easement due to flooding on their property related to Hurricane Harvey. After that catastrophic storm, property owners filed thousands of claims in the CFC seeking compensation on the ground that the United States Army Corps of Engineers ("Corps"), which built and operates the Buffalo Bayou and Tributaries Project ("Project") consisting of the Addicks and Barker Dams and Reservoirs, was responsible for the flooding that occurred on private properties.

The current appeals concern a judgment holding the United States liable to pay compensation to the owners of six bellwether properties situated *upstream* of the Project. The CFC issued its liability ruling in December 2019. 146 Fed. Cl. 219. And it issued a decision about compensation on October 28, 2022. 162

Fed. Cl. 495. Judgment was entered that same day, and the United States filed notices of appeal on December 27, 2022, which were timely under Federal Rule of Appellate Procedure 4(a)(1)(B)(i) because the notices were filed within 60 days from the judgment. Non-bellwether claims by upstream property owners are currently stayed before the CFC in the underlying case.

Related litigation over properties located *downstream* of the Project remains pending before a different judge of the CFC, following this Court's decision to reverse the CFC's dismissal order in those cases. *See Milton v. United States*, 36 F.4th 1154, 1163 (Fed. Cir. 2022). Summary judgment briefing on remand in the downstream cases is scheduled to be completed on May 12, 2023.

As explained in the attached declaration, counsel is unable to prepare and obtain authorization to file a brief by the current deadline due to the complexity and significance of the issues and the unanticipated attention and time required by previously assigned matters with proximate due dates. Counsel will exercise diligence in preparing a brief to be filed within the deadline, as extended.

Respectfully submitted,

/s/ Brian C. Toth

BRIAN C. TOTH

*Attorney*

Appellate Section

Environment and Natural Resources Division

U.S. Department of Justice

*Counsel for Defendant / Appellant*

May 5, 2023  
90-1-23-15153

## DECLARATION OF COUNSEL

I, Brian C. Toth, declare as follows:

1. I am an attorney from the Department of Justice, Environment and Natural Resources Division, Appellate Section, assigned to represent the United States in this appeal. I am primarily responsible for preparing the government's briefs in this case. The opening brief is currently due May 12, 2023. This is the government's second request to extend this deadline, having already obtained a 60-day extension. I cannot finalize and obtain authorization to file the government's opening brief by the current deadline for the following reasons.

2. Before I can file a brief on behalf of the United States in this case, I must coordinate with interested federal government components (including within the United States Department of Justice and the United States Army Corps of Engineers), culminating in review and approval by the Office of the Assistant Attorney General for the Environment and Natural Resources Division. Because of the complexity of the case and the care owed due to the significance of the issues in this case and the amount of money at stake, I cannot obtain authorization to file a brief, and if authorized complete preparation of a brief for the United States, by the current deadline.

3. In addition, my responsibilities in other assigned cases have and will continue to prevent me from preparing and finalizing an opening brief for the

government by the current due date. Notably, I have been and will continue to be heavily engaged in litigation challenging a final regulation promulgated by the United States Environmental Protection Agency and the United States Army Corps of Engineers defining “waters of the United States” under the Clean Water Act. Challenges have proceeded in three different district courts, and two appeals are now proceeding in the Sixth Circuit; the government is also deliberating whether to appeal from two other new decisions to two additional courts of appeals. Coordination among the various appellate and district court matters and filings has involved and will continue to involve extensive internal deliberations, review, and writing, including in: *Kentucky v. EPA*, 6th Cir. Nos. 23-5343, 23-5345 (responses to motions for injunctions pending appeal filed May 1, motions to clarify administrative stay order filed April 21); *Texas v. EPA*, No. 3:23-cv-17 (S.D. Tex.) (reviewing filings, preparing/reviewing internal memoranda); and *West Virginia v. EPA*, No. 3:23-cv-32 (D.N.D.) (same).

4. Further, I have been and will continue to be heavily engaged in court-assisted mediation in *Solenex LLC v. Haaland*, D.C. Cir. Nos. 22-5291, 22-5296, to reach a settlement in that matter and in *Solenex LLC v. United States*, Fed. Cir. No. 23-1353. This mediation effort has required considerable time spent on researching possible avenues to settlement, counseling within the federal

government, preparing multiple written memoranda, and participating in discussions with nonfederal intervenors and a court-assigned mediator.

5. Further responsibilities that have and will continue to prevent me from preparing and finalizing an opening brief by the current deadline include: *Shaw v. Office of Navajo-Hopi Indian Relocation*, 9th Cir. No. 22-16168 (oral argument to be held May 18); *Bayou City Waterkeeper v. U.S. Army Corps of Engineers*, 5th Cir. No. 22-40770 (response brief due May 15, extension to be sought); *Citizens for Clean Air v. DOT*, 5th Cir. No. 23-60027 (administrative record index filed March 30); *Foster v. Department of Agriculture*, 8th Cir. No. 22-2729 (oral argument held March 22); *Fort Bend County v. U.S. Army Corps of Engineers*, 5th Cir. No. 21-20174 (internal memorandum); *350 Montana v. Haaland*, No. 19-cv-12-DWM (D. Montana) (same). I also spent considerable time reviewing a response brief in *Rocky Mountain Wild v. Dallas*, 10th Cir. No. 22-1438 (filed April 27) and a response to an attorney's fees petition in *Appalachian Voices v. Department of Interior*, 4th Cir. No. 20-2159 (filed April 17).

6. Additionally, the government may not pursue an appeal from an adverse judgment unless authorized by the Solicitor General, who is responsible for determining whether, and to what extent, the government will pursue an appeal in any case in which the government receives an adverse judgment in

state or federal court. 28 C.F.R. § 0.20(b). The government requires additional time to complete that process here.

7. I have conferred with counsel for Plaintiffs-Appellees, at least some of whom will oppose this request. Ms. Nancie Marzulla stated that the Plaintiffs-Appellees she represents in this matter will not consent to the government's request and that they plan to file a response. Mr. Daniel Charest, counsel for Plaintiff/Cross-Appellants in *Micu v. United States*, stated that his clients do not oppose this request but on the condition that the government not seek any further extensions for the opening brief. However, I am not authorized or able to commit to that condition.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Brian C. Toth

Dated: May 5, 2023



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/s/ Brian C. Toth

Attorney for Defendant-Appellant the United States

Dated: May 5, 2023